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From Satirical to Satyrical: When Is a Joke Actionable?

Sandra Davidson Scott

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EDITOR'S NOTE:

FROM SATIRICAL TO SATYRICAL: WHEN IS A JOKE ACTIONABLE?

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The Volume 40 staff recognize the renewed interest our readers might have in the topic – given the political times in which we now live.

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From Satirical to Satyrical: When Is a Joke Actionable?

by

SANDRA DAVIDSON SCOTT*

Table of Contents

I.	<i>Pring and Falwell</i>	143
A.	Pring in <i>Penthouse</i> : Not an Uplifting Experience	143
B.	Falwell: From the Outhouse to the Courthouse	145
II.	Public Figures and Private Persons	148
A.	A "Thrust" into the "Vortex": Who Is a Public Figure?	148
B.	Is Pring a Private Person, or Does it Matter?	154
III.	Appropriation	159
A.	The Public Figure Advantage: Commercial Appropriation of Name and Likeness	159
B.	Limits to Appropriation: Strictly Commercial Purpose and Opinions on Newsworthy Topics.....	163
IV.	Commercial and Personal Interests	166
A.	Is the Law on Satirical Expression of Opinions Fair? ..	166
B.	"False Facts": An Oxymoron and a Hazard	169
C.	The Requirement of Literal Truth: An Invitation to Stretch Facts?	174
V.	Conclusion	176

* Assistant Professor, University of Missouri School of Journalism; B.A., University of Missouri, Columbia, 1968; M.A., University of Missouri, Columbia, 1973; Ph.D., University of Connecticut, Storrs, 1977; J.D., University of Missouri, Columbia, 1982. The author teaches communications law and serves as Legal Counsel for the newspaper produced at the school. She would like to thank Byron Scott, Professor of Journalism at the University of Missouri School of Journalism, David Fischer, Professor of Law at the University of Missouri School of Law, Lee Jolliffe, Assistant Professor of Journalism at the University of Missouri School of Journalism, and Nancy Waters, Research Assistant, for their help in writing this Article.

Introduction

Few people enjoy being the butt of a joke. Many butts have sued; some have won. This article explores the sometimes seedy, often sexy landscape of satire and parody.¹ It asks the ethical and legal question, has the law gone too far in denying plaintiffs recovery for satire that cannot be taken as literally true?

The *Penthouse* parody of Kimberli Pring's performance at the Miss America pageant provides the touchstone. She lost her suit. So did *Hustler* target Jerry Falwell. The Supreme Court wrote its *Hustler Magazine, Inc. v. Falwell*² decision in terms of "public figures," thus raising questions of who is a public figure and whether it really matters in parody cases involving statements that cannot be taken as literally true. "Public figure" plaintiffs have successfully sued in parody cases involving appropriation (commercial exploitation) of famous names and likenesses;³ but even appropriation attacks have failed in cases where an author has expressed an opinion on a newsworthy topic. Comparing the success of Johnny Carson's appropriation suit over a portable toilet named "Here's Johnny" with the failure of Kimberli Pring's suit, it appears that courts show more sensitivity to commercial than personal injury.

The primary error in the *Pring* opinion is its flawed logic that if a satire contains statements that cannot be literally true, it cannot be libelous. This logic fails to appreciate that such satire can in fact damage reputations by creating a nagging question in the reader's mind—are the statements really based on *facts* that merely have been stretched for humorous effect?

1. According to the *Oxford English Dictionary*, a satire is a composition which holds up "prevailing vices or follies" to ridicule. The term is "less correctly" applied to compositions that "ridicule a particular person or class of persons, a lampoon." A parody is a composition in which an author's "characteristic turns of thought and phrase . . . are imitated in such a way as to make them appear ridiculous, especially by applying them to ludicrously inappropriate subjects." The term "parody" also applies to a "burlesque of a musical work." See OXFORD ENGLISH DICTIONARY (2d ed. 1989).

In short, satires hold up vices or follies to ridicule, while parodies hold up literary, artistic, or musical works to ridicule through imitation. Parodies would thus fall under satire as a subset.

Some cases involve both satire in its broader sense and parody. For instance, Jerry Falwell was held up to ridicule (satire) through a ridiculous imitation of a Campari Liqueur ad (parody) in *Hustler* magazine. At the bottom of the page appeared the disclaimer, "ad parody." See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988).

2. 485 U.S. 46 (1988).

3. See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983); *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360 (S.D.N.Y. 1988); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

I

*Pring and Falwell***A. Pring in *Penthouse*: Not an Uplifting Experience**

The case of Kimberli Jayne Pring shows how outrageous satire can be and yet still be legally permissible. In separate lawsuits, the Miss America Pageant and Kimberli Pring, a former "Miss Wyoming" and Women's Grand National Baton Twirling Champion,⁴ sued *Penthouse* magazine for libel.⁵ *Penthouse* published the story, "Miss Wyoming Saves the World . . .," in its August 1979 issue. The subtitle to the article says, "But She Blew the Contest with Her Talent."⁶

The story tells of "Charlene," a "Miss Wyoming" who is going to twirl her baton for the talent portion of the "Miss America" contest:

She is about to go on stage and her thoughts are described. She thinks of Wyoming and an incident there when she was with a football player from her school. It describes an act of fellatio whereby she causes him to levitate. The story returns to the Miss America stage where she goes on to perform her talent. She there performs a fellatio-like act on her baton, which stops the orchestra. . . . She did not reach the finals. . . . Charlene's thoughts are again described and these are how she would have answered the questions put to the finalists had she been one. These thoughts were that she would "save the world" with her real talent with the "entire Soviet Central Committee to prevent a Third World War? Marshall Tito? Fidel Castro?" She would be the ambassador of love and peace. The article then describes an act of fellatio with her coach at the edge of the stage while the audience was applauding the new Miss America in center stage. This . . . causes the levitation of her coach. . . . [T]he television cameras were not on the new Miss America but "remained" on Charlene and her coach who was then rising into the air, and the story ends.⁷

English professor Philip Cioffari, who wrote the story, claimed that he intended it to be a fictional work in no way resembling any real person or real event.⁸ *Penthouse* argued that "the story is a spoof of the contest, ridicule, an attempt to be humorous, 'black humor,' a complete fantasy which could not be taken literally."⁹

4. Spence, *The Sale of the First Amendment*, A.B.A. J., Mar. 1989, at 52, 52 (1989).

5. See *Pring v. Penthouse Int'l*, 695 F.2d 438, 439 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983); *Miss America Pageant v. Penthouse Int'l*, 524 F. Supp. 1280, 1281 (D.N.J. 1981).

6. *Miss America Pageant*, 524 F. Supp. at 1285. This case arose from the same factual situation as the *Pring* case. The Miss America Pageant, a public figure plaintiff, lost this libel case on a summary judgment motion because of its failure to present clear and convincing evidence of defendant's "actual malice". *Id.* at 1287-88. See *infra* notes 39-74 and accompanying text on "actual malice" and "public figures."

7. *Pring*, 695 F.2d at 441.

8. *Miss America Pageant*, 524 F. Supp. at 1281.

9. *Pring*, 695 F.2d at 439.

The trial jury awarded Pring 1.5 million dollars in compensatory damages and \$25 million in punitive damages. The trial judge reduced the punitive award by half, to \$12.5 million.¹⁰ *Penthouse* appealed.¹¹ The Tenth Circuit Court of Appeals accepted the jury's view that the story about a baton-twirling "Miss Wyoming" named Charlene was about the plaintiff, a baton-twirling Miss Wyoming named Kimberli. But the court ruled against Kimberli on the grounds that the story could not reasonably be understood as a statement of fact:

We have impossibility and fantasy within a fanciful story. Also of significance is the fact that some of the incidents were described as being on national television and apparently before the audience at the pageant. . . . This in itself would seem to provide a sufficient signal that the story could not be taken literally. . . .

. . . .
[I]t is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else.¹²

In short, the court said that if a story cannot be taken literally, it cannot be defamatory.¹³ Pring's attorney wanted the court to apply this doctrine to public figures, not private individuals, but the court declined.¹⁴ The court's reversal of the trial court's judgment on the issue of defamation was not surprising because the law is well-established that to recover in a defamation suit, a plaintiff must prove a false statement of fact.¹⁵

While calling the story "a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants,"¹⁶ the court decided that the story was protected by the first amendment and "[t]he magazine . . . should not have been tried for its moral standards."¹⁷ The court further ruled that "[i]t would serve no useful purpose to treat sepa-

10. 8 Media L. Rep. (BNA) 2409, 2409 (10th Cir. 1982); see 695 F.2d 438 (10th Cir. 1982) (official reporter does not include verdict); see also Spence, *supra* note 4, at 52.

11. Pring v. Penthouse Int'l, 695 F.2d 438, 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

12. *Id.* at 441, 443.

13. According to the court in *Pring*,

The test is not whether the story is or is not characterized as "fiction," "humor," or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated. If it could not be so understood, the charged portions could not be taken literally.

Id. at 442.

14. See National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Greenbelt Coop. Publishing Ass'n v. Bressler, 398 U.S. 6 (1970); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979).

15. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

16. *Pring*, 695 F.2d at 438.

17. *Id.*

rately the 'false light' cause of action nor the 'outrageous conduct' doctrine sought to be injected into the trial, as the same [f]irst [a]mendment considerations must be applied."¹⁸ The Supreme Court denied certiorari.¹⁹ In short, Pring met with no success.

B. Falwell: From the Outhouse to the Courthouse

The United States Supreme Court faced the same issues in the case of *Hustler Magazine, Inc. v. Falwell*.²⁰ *Hustler* magazine ran a parody advertisement which looked like a Campari Liqueur ad. Campari had been running ads with celebrities talking about their "first time" (double entendre intended) drinking the liqueur. In the parody ad, Reverend Jerry Falwell talked about his "first time" with his mother in an outhouse. Both were supposedly drunk at the time.²¹ At the bottom of the page, in fine print, appeared the disclaimer: "[A]d parody—not to be taken seriously."²²

Falwell sued *Hustler* and its publisher, Larry Flynt, for libel, invasion of privacy, and intentional infliction of emotional distress.²³ During a pretrial deposition, an attorney for Falwell asked *Hustler* publisher Flynt if he was trying to damage Jerry Falwell's reputation for integrity. Flynt answered that he was trying to "assassinate" Falwell's reputation.²⁴

At the close of evidence in the trial, the judge dismissed Falwell's invasion of privacy claim. That claim stated Falwell had been damaged by the unauthorized use of his name or likeness for purposes of trade.

18. *Id.* at 442.

19. 462 U.S. 1132 (1983).

20. 485 U.S. 46 (1988). See R. SMOLLA, JERRY FALWELL V. LARRY FLYNT (1988); Recent Developments, 19 ST. MARY'S L.J. 1146 (1988); Note, *Falwell v. Flynt: First Amendment Protection of Satirical Speech*, 39 BAYLOR L. REV. 313 (1987) (discussing intentional infliction of emotional distress and criticizing the Fourth Circuit for upholding Falwell's damage award).

21. The text of the advertisement follows:

JERRY FALWELL TALKS ABOUT HIS FIRST TIME

Falwell: My first time was in an outhouse in Lynchburg, Virginia.

Interviewer: Wasn't it a little cramped?

Falwell: Not after I kicked the goat out.

Interviewer: I see. You must tell me all about it.

Falwell: I never really expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, 'What the hell!'

Interviewer: But your mom? Isn't that a bit odd?

Falwell: I don't think so. Looks don't mean that much to me in a woman.

R. SMOLLA, *supra* note 20, at 20.

22. *Hustler*, 485 U.S. at 48.

23. *Id.* at 47-48.

24. *Falwell v. Flynt*, 797 F.2d 1270, 1273 (4th Cir. 1986), *rev'd*, 485 U.S. 46 (1988). The court opinion quotes excerpts from the deposition:

The judge ruled that the use of Falwell's name and likeness did not fall within the statutory meaning of "for purposes of trade."²⁵

The jury ruled against Falwell on libel, finding that the parody could not "reasonably be understood as describing actual facts . . . or events."²⁶ But the jury did award Falwell \$200,000 for intentional infliction of emotional distress—\$100,000 in compensatory damages and \$100,000 in punitive damages.²⁷

Falwell, the founder of the "Moral Majority," had voluntarily "thrust himself into the vortex of this public issue" and thus was a public figure.²⁸ Despite Falwell's public figure status, the Fourth Circuit upheld

Q. Did you want to upset Reverend Falwell?

A. Yes. . . .

Q. Do you recognize that in having published what you did in this ad, you were attempting to convey to the people who read it that Reverend Falwell was just as you characterized him, a liar?

A. He's a glutton.

Q. How about a liar?

A. Yeah. He's a liar, too.

Q. How about a hypocrite?

A. Yeah.

Q. That's what you wanted to convey?

A. Yeah.

Q. And didn't it occur to you that if it wasn't true, you were attacking a man in his profession?

A. Yes.

Q. Did you appreciate, at the time that you wrote "okay" or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that?

A. Yeah.

Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could?

A. To assassinate it.

797 F.2d at 1273.

While Flynt's attorney attempted to argue that Flynt was "mentally incapable of telling the truth" when he was deposed, the court rejected this argument, saying that the relevant question was one of Flynt's credibility, not his competency. *Id.* at 1277.

25. *Id.* at 1273. Falwell had attempted to invoke VA. CODE ANN. §§ 8.01-.40 (1984).

26. *Hustler Magazine v. Falwell*, 485 U.S. 46, 48-49 (1988).

27. *Id.* Judge Wilkinson claims that the tort of emotional distress originated in an English case involving a joke: "The tort began in a case where a woman suffered serious and permanent injuries after a practical 'joker' told her to get two pillows to fetch her husband home because he was smashed up in an accident and had two broken legs. *Wilkinson v. Downtown*, [1897] 2 Q.B.D. [sic] 57." *Falwell v. Flynt*, 805 F.2d 484, 485-86 (4th Cir. 1986) (Wilkinson, J., dissenting from *en banc* denial of rehearing).

28. The "vortex" language comes from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1973). See also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967).

Judge Wilkinson said this of Falwell:

It is true that he does not hold an office or cast a vote. Yet he is as integral a part of political life as those who do. . . . The Reverend Falwell is at the forefront of major policy debates; he enjoys the most intimate access to the highest circles of power; he

the damage award for intentional infliction of emotional distress.²⁹ *Hustler* appealed.³⁰

Falwell's attorney asked the Supreme Court to hold, in effect, that even in cases involving a parody, the state's interest in protecting public figures from emotional distress was sufficient to deny first amendment protection to that speech. The Court refused to do so.³¹

Chief Justice William Rehnquist wrote the *Falwell* opinion for a unanimous Court. In a glowing endorsement of free speech, the Supreme Court made clear its interest in preserving the "free trade of ideas," even when the speech is patently offensive and is intended to inflict emotional distress. The Court expressed concern over the chilling effect on political cartoons if plaintiffs who could not recover for libel were allowed to recover for emotional distress.³² "The appeal of the political cartoon or caricature is often based on exploration of unfortunate physical traits or politically embarrassing events—an exploration often calculated to injure the feelings of the subject of the portrayal."³³ History is on the side of "caustic" cartoons: "[F]rom the early cartoon portraying George Washington as an ass³⁴ down to the present day, graphic depictions and satiri-

possesses a forum for presenting his views and establishing his character; he has sought and relished the give-and-take of political combat. This category of public figure, as much as any public official, will draw "the vehement, caustic, and sometimes unpleasantly sharp attacks" that create emotional distress.

Falwell v. Flynt, 805 F.2d 484, 485 (4th Cir. 1986) (Wilkinson, J., dissenting from *en banc* denial of rehearing) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

29. *Falwell v. Flynt*, 797 F.2d 1270, 1277 (4th Cir. 1986), *rev'd*, 485 U.S. 46 (1988). Flynt's attorneys argued that a reasonable jury could not believe that the parody described actual facts; therefore, the parody was an opinion and was protected by the first amendment. The court, however, said that it did not need to address whether the parody was opinion because the issue was whether the parody was "sufficiently outrageous to constitute intentional infliction of emotional distress." The Fourth Circuit found evidence of "outrageousness" in the language of the parody itself, and in the fact that Flynt republished the parody after *Falwell* filed his lawsuit. *Id.* at 1275-76.

The Court of Appeals denied Flynt's request for a rehearing. *Falwell*, 805 F.2d at 484. Judge Wilkinson dissented, arguing that "one simply cannot subject a parody of a political figure to a cause of action for emotional distress. The reason for this is obvious. Political satire and parody aim to distress. This genre of commentary depends upon distortion and discomfiture for its effect." *Id.* at 486-87 (Wilkinson, J., dissenting from *en banc* denial of rehearing) (emphasis in original).

30. *Hustler*, 485 U.S. at 47.

31. *Id.* at 50.

32. *Id.* at 52.

33. *Id.* at 54.

34. In 1789, a cartoonist depicted President George Washington's aide David Humphreys leading a donkey that carried George Washington. The caption read, "The glorious time has come to pass/When David shall conduct an ass." *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting from *en banc* denial of rehearing) (citing S. HESS & M. KAPLAN, *THE UNGENTLEMANLY ART: A HISTORY OF AMERICAN POLITICAL CARTOONS* 61 (1968)).

cal cartoons have played a prominent role in public and political debate."³⁵

Falwell's attorney argued that the parody ad should be distinguished from the more traditional political cartoons because the ad was so "outrageous."³⁶ But the Court held that using "outrageousness" as a standard in the area of political and social speech is simply too subjective. It would allow juries to impose liability based on their tastes or dislikes.³⁷

The bottom line for the Supreme Court is this:

[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing in addition that the publication contains a false statement of fact which was made with "actual malice." . . . [S]uch a standard is necessary to give adequate "breathing space" to the freedoms protected by the [f]irst [a]mendment.³⁸

II

Public Figures and Private Persons

A. A "Thrust" into the "Vortex": Who Is a Public Figure?

The Supreme Court has clearly signaled that public figures who become the target of a joke will have particular trouble recovering. This raises the question: Who is a public figure?

In 1964, the Supreme Court in the landmark case, *New York Times Co. v. Sullivan*,³⁹ ruled that public officials in libel cases would have to

35. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54 (1988). Parody as a method to comment on society dates back to ancient Greeks. "Chaucer, Shakespeare, Pope, Voltaire, Fielding, Hemingway and Faulkner are among the myriad of authors who have written parodies. Since parody seeks to ridicule sacred verities and prevailing mores, it inevitably offends others, as evinced by the shock which Chaucer's *Canterbury Tales* and Voltaire's *Candide* provoked among their contemporaries." *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 28 (1st Cir. 1987).

Political cartoons, however, have occasionally led to liability when they contain defamatory content. See, e.g., *Newby v. Times-Mirror Co.*, 173 Cal. 387, 160 P. 233 (1916) (political cartoon implying felonious changing of public records); *Morley v. Post Printing & Publishing Co.*, 84 Colo. 41, 268 P. 540 (1928) (political cartoon charging governor with granting pardons for bribes). See generally Annotation, *Libel and Slander: Defamation by Cartoon*, 52 A.L.R.4TH 424 (1987 & Supp. 1989); Annotation, *Libel or Slander: Defamation by Statement Made in Jest*, 57 A.L.R.4TH 520 (1987 & Supp. 1989). Accusations of crime historically have been considered defamatory. See RESTATEMENT (SECOND) OF TORTS § 571 (1977); *infra* note 160 and accompanying text. Also, historically, slander *per se* (i.e., slander without proof of "special harm") was imputed from accusations of contracting a "loathsome disease," conducting a "matter incompatible with . . . business, trade, profession, or office," or exhibiting "serious sexual misconduct." RESTATEMENT (SECOND) OF TORTS §§ 570, 572-574.

36. *Hustler*, 485 U.S. at 50.

37. *Id.* at 55.

38. *Id.* at 56 (emphasis added).

39. 376 U.S. 254 (1964).

prove "actual malice" on the part of defendants.⁴⁰ Under this "actual malice" standard, the plaintiff must prove the defendant's knowledge of falsity or reckless disregard for a statement's truth or falsity.⁴¹ Three years later, the Court voted five to four to extend this doctrine of "actual malice" to public figures.⁴² Justice Warren wrote what became the Court's position on this extension. He reasoned,

[M]any who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large. . . .

. . . [A]lthough they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials."⁴³

In 1974, in *Gertz v. Robert Welch, Inc.*,⁴⁴ the Court limited the concept of who is a public person,⁴⁵ holding that "absent clear evidence of

40. *Id.* at 279-80.

41. *Id.*

42. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (consolidated with *Associated Press v. Walker*).

In *Associated Press v. Walker*, an Associated Press eyewitness news dispatch from the University of Mississippi was circulated around the Nation. The University had been ordered by a federal court to enroll a black student, James Meredith. The A.P. dispatch said that retired Army Major General Walker took command of a violent crowd and led a riot against federal marshals trying to enforce the court's order. The Supreme Court ruled against plaintiff Walker by a vote of nine to zero. *Id.* at 142.

In *Curtis Publishing Co. v. Butts*, Wallace Butts was the former athletic director for the University of Georgia. The Saturday Evening Post ran a story saying that while Butts had been athletic director for the University of Georgia, he had given some of his school's football secrets to Paul "Bear" Bryant, coach of the University of Alabama. Supposedly Butts had given Bryant this secret information over the telephone a week before the game, and an insurance salesman, who had been accidentally connected into the telephone line, overheard the conversation. By a decision of five to four, the Court ruled for plaintiff Butts.

All the Justices agreed that Walker and Butts were "public figures." Justice Harlan stated, "Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Id.* at 155 (Harlan, J., writing for the Court).

43. *Id.* at 164.

44. 418 U.S. 323 (1974).

45. The decision in *Gertz* also marked a retreat from the Court's high-water mark in imposing the "actual malice" standard. Three years earlier, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), a plurality of the Court voted to extend the actual malice requirement to cases involving a "matter of public interest." Thus, the Court was looking at whether the subject matter of the case was one of public interest instead of asking whether the plaintiff was a public official or a public figure. Under this approach, the actual malice standard was ap-

general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life."⁴⁶ The Court said that a person may be designated a public figure on either of two bases:

In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions.⁴⁷

Under *Gertz*, states are permitted to give greater protection to private individuals than to public figures in libel cases.⁴⁸ Most states use "negligence" as the standard.⁴⁹ In justifying greater protection for pri-

plied to private persons caught up in events of public interest, such as Rosenbloom. *Id.* at 52. (Rosenbloom sold nudist magazines, but a Philadelphia radio station falsely said he was linked to "the smut literature racket." *Id.* at 34-35.) The Court's *Rosenbloom* approach was short-lived; a majority of the Justices never approved this position. Three years later, in *Gertz*, the Court made clear that it would be looking at the plaintiff, not the subject matter, to determine whether to apply the *New York Times* standard.

46. *Gertz*, 418 U.S. at 352.

47. *Id.* at 351-52.

48. The *Gertz* Court stated the following:

Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. . . . Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. . . . [W]e conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Id. at 342-43.

The bottom line in *Gertz* is the following:

We hold that, so long as they do not impose liability without fault, the [s]tates may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach . . . recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.

Id. at 347-48.

The Court also held that states could not permit plaintiffs to recover punitive damages unless the plaintiffs have proved "knowledge of falsity or reckless disregard for the truth." *Id.* at 349. With no such showing, plaintiffs' recovery would be limited to "actual injury." *Id.* This, of course, protects defendants from excessive awards. As the Court pointed out, punitive damages are "not compensation" for actual injury but "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.* at 350.

49. States which only require a showing of negligence include Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Mississippi, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Washington, West Virginia, and Wisconsin. Likewise, the District of Columbia and the Virgin Islands only require negligence. See Annotation, *State Constitutional Protection of Allegedly Defamatory*

vate individuals, the Court made two major points. First, public figures have greater access to the media to engage in the self-help of correcting false statements. Lacking this access, private individuals are more vulnerable to injury, so the states have a correspondingly greater interest in their protection.⁵⁰ Second, and of even greater importance to the Court, a compelling normative consideration underlies the public figure/private person distinction:⁵¹ generally, "public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. . . . [T]hey invite attention and comment."⁵² While these two factors may not always exist, the media is justified in assuming that "public figures have voluntarily exposed themselves to increased risk of injury."⁵³

Statements Regarding Private Individual [sic], 33 A.L.R.4TH 226-28 (1984 & Supp. 1989). The following states also require only a showing of negligence: Alabama, Connecticut, Iowa, Maine, Michigan, Minnesota, and New Hampshire. LIBEL DEFENSE RESOURCE CENTER, 50-STATE SURVEY 1989, at 5, 118-19, 332-33, 413, 472, 494, 582 (1989) [hereinafter 50-STATE SURVEY].

New York requires a showing of "gross irresponsibility." Annotation, *supra*, at 223-26 (1984) (citing, e.g., *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 416 N.E.2d 557, 435 N.Y.S.2d 556 (1980)).

Some states—Alaska, Colorado, Indiana, Michigan, Texas, and Virginia—require that private plaintiffs, like public figures, show actual malice, at least in some circumstances. See Annotation, *supra*, at 221-23 (citing, e.g., *Gay v. Williams*, 486 F. Supp. 12 (D. Alaska 1979); *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982); *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert denied*, 424 U.S. 913 (1976)) & at 26-27 (Supp. 1989) (citing, e.g., *Bichler v. Union Bank & Trust Co.*, 745 F.2d 1006 (6th Cir. 1984); *Golden Bear Distrib. Sys., Inc. v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983); *Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, *cert. denied*, 472 U.S. 1032, (1985)). New Jersey also requires that private plaintiffs show actual malice in cases involving media defendants. 50-STATE SURVEY, *supra*, at 596 (citing *Sisler v. Gannett*, 104 N.J. 256, 270, 516 A.2d 1083, 1090 (1986)).

In some circumstances, Michigan, Texas, and Virginia only require a showing of negligence. See Annotation, *supra*, at 228, 230-31. Alaska may move to a negligence standard. See 50-STATE SURVEY, *supra*, at 17 (citing *Sisemore v. U.S. News & World Report*, 662 F. Supp. 1529 (D. Alaska 1987) (predicting a change in standard); *Schneider v. Pay'N Save Corp.*, 723 P.2d 619, 625 (D. Alaska 1986) (reserving decision on the standard)).

The standard in Missouri is unclear, since the *Missouri Approved Jury Instructions* only require a finding of "fault" but do not define that term. See MISSOURI APPROVED JURY INSTRUCTION 23.06(1) (West 1980). The term "fault" is also undefined in Louisiana. See 50-STATE SURVEY, *supra*, at 389-90.

Idaho, Mississippi, Montana, Nebraska, Nevada, North Dakota, Rhode Island, South Dakota, and Wyoming have had no cases deciding the standard of fault in defamation cases involving private plaintiffs and media defendants. See 50-STATE SURVEY, *supra*, at 277, 511, 546, 554, 569, 688, 768, 795, 949. In California, North Carolina, and Wisconsin, the standard is unsettled. See *id.* at 64-65, 655, 933.

50. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

51. *Id.* at 344-45.

52. *Id.* at 345.

53. *Id.* at 344-45. "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public

The issue of who is a public figure was hotly litigated in the late 1970s. In *Time, Inc. v. Firestone*,⁵⁴ the Court, in a five to four decision, narrowed the definition of who is a public figure. *Time*, in its "Milestones" section, published the following:

DIVORCED. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."⁵⁵

Strictly speaking, the court did not make a finding of adultery in granting a divorce.

The judge noted in his decree that Mr. Firestone filed for divorce on the grounds of extreme cruelty and adultery.⁵⁶ The exact words the judge used were,

According to certain testimony in behalf of [Mr. Firestone], extramarital escapades of [Mrs. Firestone] were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in [Mrs. Firestone's] behalf, would indicate that [Mr. Firestone] was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated. . . .

. . . [N]either of the parties has shown the least susceptibility to domestication, and . . . the marriage should be dissolved.⁵⁷

Mrs. Firestone sued for libel. The Supreme Court concluded that to have been accurate, *Time* should have reported that the ground for the divorce was "lack of domestication of the parties."⁵⁸

Time argued that Mrs. Firestone was a public figure and, therefore, the "actual malice" standard should apply, but the Supreme Court held that she was not a public figure, not even for limited purposes.⁵⁹

figures must be exceedingly rare." *Id.* at 345.

One example of an "involuntary public figure" is Oliver Sipple, the Vietnam veteran who saved President Gerald Ford's life in 1975. Sipple deflected Sara Jane Moore's arm as she fired a .38 revolver at the President in San Francisco. A columnist wrote that the gay community in San Francisco was proud of Sipple and that Sipple might help to dispel some of the stereotypes of homosexuals. Sipple sued over the printing of facts about his sexual orientation without gaining his consent. His suit was dismissed because a California court determined that he had been thrust into the vortex of an incident of international newsworthiness. *Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 1049-50, 201 Cal. Rptr. 665, 670 (1984).

54. 424 U.S. 448 (1976).

55. *Id.* at 452 (citing "Milestones" section from *TIME*, July 8, 1968).

56. *Id.*

57. *Id.* at 450-51.

58. *Id.* at 458-59.

59. *Id.* at 455.

Although Mrs. Firestone had held news conferences during the trial, the Supreme Court said she had not assumed "any role of especial prominence in the affairs of society, other than perhaps Palm Beach society,"⁶⁰ and had not "thrust herself to the forefront of any particular public controversy."⁶¹ She should not be deemed a public figure merely because she was drawn into litigation as a defendant in a divorce case.⁶²

In 1979, on the same day, the United States Supreme Court decided two cases involving public figures. These cases again reflect the Court's narrow view of who constitutes a public figure. The first case was *Hutchinson v. Proxmire*.⁶³ Senator William Proxmire had given a "Golden Fleece" award to Ronald Hutchinson, a scientist who did federally funded research on monkey behavior, such as the response of monkeys to aggravating stimuli.⁶⁴ Proxmire did not think that the more than \$500,000 awarded to Hutchinson to aggravate monkeys was a good expenditure.⁶⁵ In a news release, Proxmire said that Hutchinson "made a fortune from his monkeys and in the process made a monkey of the American taxpayer."⁶⁶ The Court said that Hutchinson was not a public figure, not even for the limited purpose of comment on his receipt of federal research funds.⁶⁷ The Court emphasized that Hutchinson had not "thrust himself or his views into public controversy to influence others,"⁶⁸ nor did he have any "regular and continuing access to the me-

60. *Id.* at 453.

61. *Id.*

62. *Id.* at 453-54. Justice Rehnquist, writing for the Court, said,

Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent [Mrs. Firestone] freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony.

Id. at 454. In a footnote, Rehnquist said, "Nor do we think the fact that [Mrs. Firestone] may have held a few press conferences during the divorce proceedings in an attempt to satisfy inquiring reporters converts her into a 'public figure.'" *Id.* at n.3.

63. 443 U.S. 111 (1979).

64. *Id.* at 114-15.

65. *Id.* at 114-16. The Court noted that the \$500,000 figure used by Proxmire in announcing the "award," was being disputed by both parties to the lawsuit. *Id.* at 114 n.1.

66. *Id.* at 116. The Court said Proxmire's news release was not protected by Congressional immunity. *Id.* at 130. The Court stated that

A speech by Proxmire in the Senate would be wholly immune and would be available to other [m]embers of Congress and the public in the *Congressional Record*. But neither the newsletters nor the press release was "essential to the deliberations of the Senate" and neither was part of the deliberative process.

Id.

67. *Id.* at 135.

68. *Id.*

dia.”⁶⁹ Furthermore, defendants, by their own conduct, could not transform private individuals into public figures.⁷⁰

The second libel case decided on that day was *Wolston v. Reader's Digest*.⁷¹ Wolston had sued Reader's Digest because a book it published in 1974 listed him among Soviet agents.⁷² Wolston had been in the public eye briefly, sixteen years earlier, when he was convicted for contempt of court for not showing up for a grand jury investigation into Soviet espionage.⁷³ The Court again emphasized that Wolston had not “‘voluntarily thrust’ or ‘injected’ himself into the forefront of the public controversy surrounding the investigation of Soviet espionage.”⁷⁴

B. Is Pring a Private Person, Or Does It Matter?

Given this background of Supreme Court cases on public figures, was Kimberli Pring's participation in the Miss America pageant enough to say that she had willfully “thrust” herself into the “vortex” of a national controversy over the propriety of beauty contests and assumed “special prominence” in the resolution of the controversy? Did she “engage the public's attention in an attempt to influence” the outcome of the controversy?⁷⁵ And does it make a difference in her case?

The trial court in the *Pring* case considered whether Pring was a public figure as a threshold issue.⁷⁶ After considering her activities as a beauty queen contestant and a baton twirler,⁷⁷ the judge concluded that

69. *Id.*

70. *Id.* at 136. The Court reasoned,

Hutchinson's . . . published writings reach a relatively small category of professionals concerned with research in human behavior. To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award. Clearly those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.

Id. at 135.

71. 443 U.S. 157 (1979).

72. *Id.* at 159.

73. *Id.* at 162-63.

74. *Id.* at 166.

It would be more accurate to say that [Wolston] was dragged unwillingly into the controversy. The Government pursued him in its investigation. [Wolston] did fail to respond to a grand jury subpoena, and this failure, as well as his subsequent citation for contempt, did attract media attention. But the mere fact that petitioner voluntarily chose not to appear before the grand jury, knowing that his action might be attended by publicity, is not decisive on the question of public-figure status.

Id. at 166-67.

75. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974).

76. *Pring v. Penthouse Int'l*, 7 Media L. Rep. (BNA) 1101, 1102 (D. Wyo. 1981), *rev'd*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983). The court considered this issue in deciding against the defendants' motions for summary judgment.

77. Pring won the “Miss Wyoming” contest and appeared in the “Miss America” pageant in 1978. She also participated in the “Wyoming Miss Universe” contest, the 1975 “Miss

while her voluntary endeavors to achieve prominence perhaps resulted in a modest income as a baton-twirling instructor, she certainly had gained no "pervasive fame."⁷⁸ Nor was there any evidence that she had gained any increased access to the media.⁷⁹ The judge considered it a "matter of general knowledge" that the United States has a "multitude of beauty contests" and "countless marching bands" with a baton twirler.⁸⁰ But except for winners of major contests like the Miss America Pageant, contestants "fade" into private life.⁸¹ In determining Pring's status as a private figure, the trial judge reasoned,

Ex-beauty queens and ex-twirling champions surely do not assume an "influential role in ordering society." Nor have they "assumed roles of especial prominence in the affairs of society," nor do they occupy positions of "persuasive power and influence." Neither can it be said that the Plaintiff has drawn herself into any particular public controversy and thereby became a limited public figure. . . . To hold her a public figure would mean that every good twirler and every beauty contestant is forever and ever a public figure; and therefore subject to defamatory statements without redress except for actual malice. We cannot believe that such a result was intended by the Supreme Court.⁸²

U.S.A. Beauty Pageant," the 1977 "Miss Black Velvet" contest, and the "National Sweet Corn Festival," but did not win. She won first place in the 1977 National Baton Twirling Championship and was runner-up in the 1977 "Majorette of America" contest. She won the "Miss Majorette of Wyoming" title four times. Pring was also a twirler for the University of Wyoming for four years. Her picture has appeared on covers of baton twirling publications, and she claims to have won 500 baton-twirling trophies. *Id.* at 1103.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1103-04 (citations omitted).

A centerfold beauty, however, was held to be a "public figure" in *Vitale v. National Lampoon, Inc.*, 449 F. Supp. 442, 445 (E.D. Pa. 1978). This case involved a "Gentleman's Bathroom Companion," which contained a parody of *Playboy* magazine. *Id.* at 443 n.2. *Playboy* had run an advertisement featuring a man on a ski slope with a couple of women. The ad asked, "WHAT SORT OF MAN READS PLAYBOY?" It answered, in part,

He's a man who demands the best that life has to offer. When he takes to the slopes he prides himself on having the newest and best gear going. And his buying guide is PLAYBOY. Fact: PLAYBOY is read by 42% of all men who spent \$100 or more on ski equipment last year.

Id. at 447. The parody ad used a picture of a man sitting on a toilet with a *Playboy* magazine stretched out on the floor, opened to reveal the "Playmate" centerfold. The stall door was closed. The parody ad also asked, "WHAT SORT OF MAN READS PL*YB*Y?" It answered, in part,

A young man in touch with himself and his own imagination. . . . With confidence in his ability to handle himself in tense situations, the PL*YB*Y reader wrings every last drop of satisfaction from his private pursuits. Helping him stand up to that challenge is his favorite magazine. Fact: PL*YB*Y is read by nearly half of all young men who . . . spent at least \$12 on fine spurting goods last year alone.

Id. at 448. The district court explained that "To spare ourselves the literary voyage OUT which would be required to describe the [parody] picture, we have appended a copy to this

The Tenth Circuit did not directly address the issue of whether Pring was a "public" or "private" individual, although the court seemed tacitly to accept the lower court's view that she should be accorded "private person" status. Pring argued that the constitutional doctrine that words "must reasonably be understood as describing actual facts about the plaintiff" to be defamatory should apply only to public figures.⁸³ However, the court said that "there is no such limitation and the disposition of the several cases considered . . . so demonstrates."⁸⁴ The cases considered, *National Association of Letter Carriers v. Austin*⁸⁵ and *Greenbelt Cooperative Publishing Association v. Bresler*,⁸⁶ involved private individuals and language that could not be taken literally. In *Letter Carriers*, persons not joining a union were called "scabs," and a scab was described as "a traitor to his God, his country."⁸⁷ In *Greenbelt Cooperative*, a landowner who held property the city wanted to purchase asked that other land he owned be rezoned; a newspaper characterized this activity as "blackmail." But both the "traitor" and "blackmail" language could not be taken literally.⁸⁸ Does this mean it does not matter if Pring is a private person—that if the story literally cannot be true, private persons are no better off as plaintiffs than public figures?

opinion so the reader may share the euphoria of this unique aesthetic experience without the unwelcome intervention of an interpreter." *Id.* at 443.

The "Playmate" in the centerfold that lay open on the restroom floor in the parody sued for libel—unauthorized use of her picture that damaged her reputation. *Id.* Based on her voluntarily posing nude for *Playboy* on several occasions and "obviously" seeking and getting her photos circulated internationally, the court found her a public figure for the limited purpose of "her role in *Playboy*." *Id.* at 445. The court granted a summary judgment for the defendant, finding that the plaintiff produced no evidence of actual malice. *Vitale* held that the parody was making no statement about the plaintiff, but about those who read *Playboy*; the plaintiff's picture just happened to be the centerfold at the time *National Lampoon* produced its parody. *Id.* at 446.

83. *Pring v. Penthouse Int'l*, 695 F.2d 438, 440 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

84. *Id.* at 442.

85. 418 U.S. 264 (1974).

86. 398 U.S. 6 (1970).

87. *Pring*, 695 F.2d at 440 (citing *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 268 (1974)). The "traitor" language comes from a Jack London article, *The Scab*, reprinted in the newsletter of the Letter Carrier's union. The article begins, "After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a *scab*." *Letter Carriers*, 418 U.S. at 268.

88. *Pring*, 695 F.2d at 440. The Tenth Circuit quoted the Supreme Court as follows: "[W]e hold that the imposition of liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word 'blackmail' in these circumstances was . . . not libel." *Id.* (quoting *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13 (1970)).

Gerry Spence, who was Pring's lawyer,⁸⁹ believes that the law should treat private individuals differently than public figures. "Unlike Falwell, she [(Pring)] was not a public figure, but instead a sensitive, very private person," says Spence.⁹⁰ He described the emotional distress Pring went through after *Penthouse* published the story on her supposed expertise at fellatio:

Now whenever Kim walked down the street, men hollered out of open car windows, "Hey Penthouse, are you really that good?" She was plagued with obscene phone calls. She literally had been driven out of the University of Wyoming by the laughter and, although she was an above-average, personable student, she was unable to get a job in her home state. Two kinds interviewed her: those who would not hire her because of her publicity in *Penthouse* and those who wanted to exploit her commercially or sexually because of it. Finally in desperation she joined the army and became a chaplain's assistant. But even there she was soon recognized. "Are you as good as they say, Penthouse?"⁹¹

89. There is a connection between *Pring* and the *Hustler v. Falwell* case, according to Spence. "Sadly," Spence says, "it was my own losing case against *Penthouse* that had provided *Hustler* with the legal authority for the Falwell 'parody.'" Spence, *supra* note 4, at 52.

90. *Id.* Spence argues for greater protection for public figures as well as private persons. *Id.* at 53-58. He concludes,

[I]n *Falwell v. Flynt* we have been given a preview of the America to come under the Rehnquist Court. It is not a conservative court at all, but one governed by a new constitutional commercialism that proclaims everything must be for sale—our peace, our privacy, our good name, even the memory of our mothers.

Id. at 58.

91. *Id.* at 52. The trial court in *Pring* did not submit to the jury the question of whether allegedly libelous portions of the *Penthouse* article could be "reasonably understood as describing actual facts about the plaintiff." Instead, the trial court only submitted to the jury the question of "identity"—whether Kimberli Pring was identified in the article. *Pring v. Penthouse Int'l*, 695 F.2d 438, 442 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

The Tenth Circuit stated that "in some circumstances" the "reasonably understood" question should be decided by the jury. But, the *Pring* majority ruled that "as a matter of law" the article could not be "reasonably understood" as describing actual facts. *Id.* at 442-43. Some commentators, of course, argue for greater protection for satirists.

One commentator argues that "some courts have departed from traditional rules and have imposed liability when a satirist has 'appropriated' the name or property of the plaintiff in a manner which is embarrassing or unpleasant; this is so especially when the material is sexually explicit. These cases have created liability for a previously unrecognized tort which this article shall call 'satiric appropriation.'" Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U.L. REV. 923, 926 (1985) (footnotes omitted). Under the heading of "libel," the author uses one example of satiric appropriation, *Salomone v. Macmillan Publishing Co.*, 97 Misc. 2d 346, 411 N.Y.S.2d 105 (N.Y. Sup. Ct. 1978), *rev'd*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (1980), a case in which she represented the defendants. Dorsen, *supra*, at 923, 930.

Salomone involved a parody of *Eloise*, the cartoon book for children published by Macmillan. See K. THOMPSON, *ELOISE* (1955). In the book, Eloise lived at New York's Plaza Hotel during the 1950s. In the parody, 26-year-old Eloise returns to the hotel and uses lipstick to scrawl on a mirror this message about the hotel manager: "Mr. Salomone was a child molester." The satirists had not realized that indeed Alphonse Salomone was the hotel manager in the mid-1950s. Dorsen, *supra*, at 930. The trial court denied a motion to dismiss the

Spence said that the jury verdict in the *Pring* case of over \$26 million represented the jury's effort "[t]o put a stop to this kind of exploitation of innocent people once and for all."⁹² When the Tenth Circuit threw out every last bit of the award, it used this reasoning, according to Spence: "Since everybody knows that one cannot be levitated by fellatio, what *Penthouse* published about Kim Pring was not fact but fantasy, and since one can be libeled only by fact, Kim was entitled to nothing."⁹³ The result? "[Pring] had no right to her name, no right to peace and privacy, no right to recover for her pain and her humiliation, no right to live an ordinary life and hold an ordinary job."⁹⁴ The twenty-five million readers claimed by *Penthouse* enjoyed a good laugh at Pring's expense.⁹⁵

Spence argues: "The monstrous joke—Kim Pring levitating men by fellatio, Jerry Falwell in the outhouse making it with his mother—is perhaps the most insidious form of defamation, because fact, wisdom, even the lessons of blood seep through the cracks of man's mortal memory, but the dirty joke is never forgotten."⁹⁶

plaintiff's suit, saying that if humor is "at the expense of a sensitive person, the right of freedom of expression and the right of privacy and freedom from undue defamation collide." *Id.* (quoting *Salomone*, 97 Misc. 2d at 347, 411 N.Y.S.2d at 107). But the appellate court dismissed the case because of the plaintiff's inability to establish harm to his reputation. *Id.* at 931 (citing *Salomone*, 77 A.D.2d at 502, 429 N.Y.S.2d at 442). The trial and appellate courts, however, both failed to address the "real question: whether the work expressed an opinion or made a factual statement." Dorsen, *supra*, at 931.

A Note by Leslie Kim Treiger points to hermeneutics, the study of interpretation or meaning, as a "helpful tool" for courts in satire cases. Note, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege*, 98 YALE L.J. 1215, 1217 (1989) [hereinafter Note, *Protecting Satire*]. She states that,

Jurors . . . must ask themselves not how they view the text, or how "ordinary readers" would perceive it, but rather how the actual readers of *such material* . . . would read the text. The relevant audience is one that is literate in the particular type of writing, and that has certain genre expectations when reading the type of material in dispute. Only if the plaintiff gives clear and convincing evidence that a substantial number of the actual readers believed the statement as fact rather than as satiric opinion, or if the jurors acting as surrogate readers believe the statement as fact, should liability be permissible.

Id. at 1233-34 (footnotes omitted) (emphasis in original).

See also Note, *Humor, Defamation and Intentional Infliction of Emotional Distress: The Potential Predicament for Private Figure Plaintiffs*, 31 WM. & MARY L. REV. 701 (1990) (authored by Catherine L. Amspacher and Randel Steven Springer) (private figure suits against media defendants).

92. Spence, *supra* note 4, at 52.

93. *Id.*; Note, *Protecting Satire*, *supra* note 91, at 1233-34.

94. Note, *Protecting Satire*, *supra* note 91, at 1234.

95. *Id.* In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court said, "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350.

96. Spence, *supra* note 4, at 52.

III Appropriation

A. The Public Figure Advantage: Commercial Appropriation of Name and Likeness

Lest recovery for satirized plaintiffs seem impossible, it should be noted that some plaintiffs, unlike Pring and Falwell, have walked away with sizeable awards after being the butt of a joke. Some plaintiffs have prevailed in parody cases involving trademark infringement.⁹⁷ Others

97. See *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397 (8th Cir. 1987) ("Mutant of Omaha" caption under an emaciated Indian's head with feather bonnet on T-shirts and muscle shirts); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979) (*Debbie Does Dallas* X-rated film, with "Debbie" partly in a look-a-like Dallas Cowboys Cheerleaders' outfit); *Chemical Corp. v. Anheuser-Busch, Inc.*, 306 F.2d 433 (5th Cir. 1962), cert. denied, 372 U.S. 965 (1963) ("Where there's life . . . there's bugs" campaign for floor wax laced with insecticide, parodying "Where there's life . . . there's Bud" beer campaign); *General Elec. Co. v. Alumpa Coal Co.*, 205 U.S.P.Q. (BNA) 1036 (D. Mass. 1979) ("Genital Electric" monogram on underwear); *Gucci Shops, Inc. v. R.H. Macy & Co.*, 446 F. Supp. 838 (S.D.N.Y. 1977) ("Gucchi Goo" diaper bag).

On the other hand, parody has been a successful defense in some trademark cases. A spoof on *Cliff's Notes* that used the words "a satire" five times on its cover could not cause confusion with the real *Cliff's Notes*. *Cliffs Notes v. Bantam Doubleday Dell Publishing Group*, 886 F.2d 490 (2d Cir. 1989).

Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482 (10th Cir. 1987), involved a small New Mexico enterprise, Hogg Wyld, Ltd., which later changed its name to Oink, Inc. Two women ran the home-based operation that made jeans for larger women. They considered several names for their jeans, including "Calvin Swine" and "Vidal Sowsoon," but then settled on the name Lardashe. Jeans manufacturer Jordache filed suit for tradename infringement under the Lanham Act, 15 U.S.C. § 1141(1)(a) (1988), which prohibits unauthorized use of a trademark in a manner that "is likely to cause confusion." The Tenth Circuit decided the name Lardashe was meant to amuse, not to confuse, stating that "[a]n intent to parody is not an intent to confuse the public." 828 F.2d at 1486. Nor did Lardashe "dilute" or "tarnish" the trademark under New Mexico law. *Id.* at 1491.

High Society used a two-page article, *L.L. Bean's Back-To-School-Sex-Catalog*, in its October 1984 issue. The magazine's contents page called the article "humor" and "parody." *L.L. Bean, Inc. v. Drake Publishers*, 811 F.2d 26, 27 (1st Cir. 1987). On first amendment grounds, the Eleventh Circuit rejected L.L. Bean's argument of trademark infringement and dilution of trademark, stating that the "parody constitutes an editorial or artistic, rather than a commercial, use of plaintiff's mark." *Id.* at 32.

A lampooning poster of a smiling, pregnant Girl Scout, captioned "BE PREPARED," withstood a trademark infringement suit. *Girl Scouts of the U.S.A. v. Personality Posters Mfg. Co.*, 304 F. Supp. 1228 (S.D.N.Y. 1969).

For scholarly articles on trademark and parody, see Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158 (arguing for greater first amendment protection when trademarks are used to communicate ideas unless "injurious associations" are created); Dorsen, *supra* note 91 (arguing for greater first amendment protection for satire in trademark infringement cases); Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U.L. REV. 131 (1989) (arguing that applying "tarnishment rationale" to noncommercial speech allows censorship that should not be tolerated under the first amendment and that Denicola's view too narrowly protects speech); Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV.

have prevailed in parody cases involving copyright infringement or infringement of both trademark and copyright.⁹⁸ But in trademark and copyright cases, the jokes generally seem less personal. Still, other plaintiffs who have been quite personally lampooned have received awards for

1079 (1986) (authored by Robert J. Shaughnessy) (movement from the "confusion" to the "dilution" test in trademark infringement cases has created a problem which the "fair use" principle cannot solve; the first amendment should limit trademark owner's rights in parody cases).

98. See *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981) ("Cunnilingus Champion of Company C" parody of "Boogie Woogie Bugle Boy of Company B"); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979) (The Fifth Circuit found the district court did not abuse its discretion by issuing a preliminary injunction halting distribution of "The Ex-Dallas Cheerleaders" poster with partial nudity parodying the copyrighted Dallas Cheerleaders' poster. The court indicated the defendant might have prevailed had it not prematurely appealed. *Id.* at 1188); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (*Air Pirates Funnies*, two cartoon magazines, with randy Disney characters populating the counterculture scene); *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517 (S.D.N.Y. 1988) (*A Nightmare on My Street* music video parody of *A Nightmare on Elm Street*); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975) ("Mickey Mouse March" used as background music for sex acts by males wearing "Mouseketeer" hats in alleged "parody of life" movie, *The Life and Times of the Happy Hooker*. The district court found that the repeated playing of the music went beyond parody to "a complete copy of the copyrighted material." *Id.* at 1398. The court issued a preliminary injunction to stop the improper use of the music. *Id.*).

The plaintiff won its request for a permanent injunction against the singing telegram company in both trademark and copyright infringement claims in *DC Comics, Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984) ("Super Stud"—"faster than a speeding tortoise; more powerful than an armpit; able to leap tall broads in a single bound; it's a nurd; it's insane; it's Super Stud"—and "Wonder Wench," who donned costumes and delivered telegrams).

But some parodying defendants have successfully defended copyright infringement cases. See, e.g., *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) ("When Sonny Sniffs Glue" parody of "When Sunny Gets Blue"); *Elsmere Music, Inc. v. National Brdcast. Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980) (*Saturday Night Live's* "I Love Sodom" parody of "I Love New York" ad campaign).

In copyright cases involving parodies, a primary concern is "fair use" of the original work. Fair use "is not an infringement of copyright." 17 U.S.C. § 107 (1988). A test for fair use appears in *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom.* *Columbia Brdcast. Sys. v. Loew's, Inc.*, 356 U.S. 43 (1958). The case involved the television network's airing of Jack Benny's parody of the movie *Gas Light*. *Id.* at 533. The court said, "A burlesque presentation . . . is no defense to an action for infringement of copyright. . . . [I]f it is determined that there was a substantial taking, infringement exists." *Id.* at 537. As admitted by the Ninth Circuit, its ruling in the *Benny* case has proved "controversial." The court later clarified its "substantiality" test:

In inquiring into the substantiality of the taking, the district court read our *Benny* opinion to hold that any substantial copying by a defendant, combined with the fact that the portion copied constituted a substantial part of the defendant's work, automatically precluded the fair use defense. . . .

The language in *Benny* should be understood as setting a threshold that eliminates from the fair use defense copying that is virtually complete or almost verbatim. . . . *Benny* should not be read as taking the drastic step of virtually turning the test for fair use into the test for infringement.

appropriation of their names or likenesses through the claim of commercial exploitation, a trespass upon the pocketbook of the famous. The "right of publicity" is another term for appropriation.⁹⁹ "[A] celebrity's

Walt Disney Prods., 581 F.2d at 756-57. In the *Benny* case, the copying was virtually complete. *Id.*

If no "near-verbatim" copying has been done, then courts can apply the test of "whether the parodist has appropriated a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire." *Id.* at 757. The "conjuring up" test was further developed in *Berlin v. E.C. Publications*, 329 F.2d 541 (2d Cir. 1964). The Second Circuit pointed out that the *Benny* decision has been "roundly criticized by many commentators." *Id.* at 544. The court decided in favor of the defendant, which had produced a parody issue of *Mad* magazine, whose cover said, "More Trash From Mad—A Sickening Collection of Humor and Satire From Past Issues." *Id.* at 542-43. It included "parody lyrics" to be sung to the music of well-known songs, some written by Irving Berlin. For example, "A Pretty Girl Is Like A Melody" was parodied as "Louella Schwartz Describes Her Malady." *Id.* at 543. The court concluded that

as a general proposition, we believe that parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' *Don Quixote* and Swift's *Gulliver's Travels*, or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest. At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.

Id. at 545 (emphasis in original).

Courts have allowed "more extensive" use of works in parodies than in other fictional or dramatic works, because a parody normally does not fill the demand for the serious work. *New Line Cinema Corp.*, 693 F. Supp. at 1525 (citing *Elsmere Music Co. v. National Brdcast. Co.*, 482 F. Supp. 741, 745 (S.D.N.Y. 1980)). Courts have, of course, found their "gag" limits. For instance, in the "Boogie Woogie Bugle Boy of Company B" case, the Second Circuit said, "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society. Such a holding would be an open-ended invitation to musical plagiarism." *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981).

For scholarly articles on copyright and parody, see Dorsen, *supra* note 91; Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 30 W. NEW ENG. L. REV. 39 (1981), reprinted in 20 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 133 (1981); Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615 (1979); Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 HARV. L. REV. 1395 (1984); Note, *The First Amendment v. Right of Publicity in Theatrical Imitations—A Delicate Balance*, 57 NOTRE DAME L. REV. 658 (1982) (authored by John G. Greiner).

99. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983). "Appropriation" or the "right of publicity" is one of the four forms of invasion of privacy enunciated by William Prosser. *Id.* (citing Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960)).

New York courts "blend the concepts" of the "common law propriety right of publicity" and the statutorily established "right of privacy"—the right to protection from "commercial exploitation" under § 51 of New York's Civil Rights Law. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978) (citation omitted). "[T]his right of publicity is usually asserted only

legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes."¹⁰⁰

For instance, in 1980, Johnny Carson recovered for appropriation of his name.¹⁰¹ Carson sued because a portable toilet was being marketed as "Here's Johnny—The World's Foremost Comedian."¹⁰² The Sixth Circuit Court of Appeals said there was an even clearer appropriation of Johnny Carson's persona than if his full proper name had been used.¹⁰³

Sometimes the relief sought by a plaintiff is an injunction—the stopping of a publication or broadcast—rather than a monetary award. In 1978, Mohammed Ali successfully obtained an injunction against *Playgirl* magazine.¹⁰⁴ On its cover, *Playgirl* used an illustration of Ali sitting naked in the corner of a boxing ring. The doggerel in the text did not mention Ali by name, but did refer to "The Greatest," which, of course, was what Ali called himself. Ali claimed that his "right of publicity" had been violated.¹⁰⁵ A federal district court in New York concluded, "There can be little question that defendants' unauthorized publication of the portrait of Ali amounted to a wrongful appropriation of the market value of the plaintiff's likeness."¹⁰⁶ The injunction against *Playgirl* forbade any further distribution of the magazine featuring Ali's image.¹⁰⁷

if the plaintiff has 'achieved in some degree a celebrated status.' " *Id.* at 729 (citations omitted).

See also *Allen v. National Video, Inc.*, 610 F. Supp. 612, 621 (S.D.N.Y. 1985) ("right of publicity" is "merely a misnomer for the privacy interest protected by the [New York] Civil Rights Law, as applied to public figures") (citing *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 472 N.E.2d 580, 485 N.Y.S.2d 220 (1984)).

100. *Carson*, 698 F.2d at 837.

101. *Id.* at 836.

102. *Id.* at 833.

103. *Id.* at 837.

Besides "name" and "likeness," voice appropriation can also be the subject of a successful suit. In 1988, "The Divine Miss M," Bette Midler, won the right to sue in a case involving appropriation of her voice in broadcast ads for cars. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). The imitation Midler was singing "Do You Want to Dance" in a manner so convincing that even her friends thought Midler was hawking cars. *Id.* at 461-62. The court said, "We hold . . . that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs." *Id.* at 463. The case was remanded for trial. *Id.* Midler won a \$400,000 jury award. Harrington, *War Declared On Musical "Groove Robbers"*, St. Louis Post-Dispatch, Aug. 2, 1990 at E1, col. 3.

104. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

105. *Id.* at 726.

106. *Id.* at 729.

107. *Id.* at 729, 732.

New York, by statute, allows injunctions to be sought by "any person whose name, portrait, or picture is used within [New York] for . . . the purposes of trade without the written consent [of that person]." *Id.* at 726. For more on the *Ali* case, see *infra* note 123.

Comedian Woody Allen obtained an injunction against a clothing store, Men's Fashion World, that was using a Woody Allen look-alike in an ad.¹⁰⁸ The caption said, "Men's Fashion World made me a sex symbol."¹⁰⁹ Even though the ad had a disclaimer which said that the man pictured was a celebrity look-alike,¹¹⁰ the court used law concerning misleading advertisements to grant the injunction. The court thought consumers could be deluded into thinking Woody Allen endorsed the fashions from Men's Fashion World.¹¹¹

The plaintiff has to prove an appropriation of name, voice or image in appropriation cases. In addition, some jurisdictions require a showing that the defendant gained a monetary advantage by the appropriation.¹¹² But plaintiffs also must be able to show "commercial purpose," and this requirement spells trouble for some plaintiffs.¹¹³

B. Limits to Appropriation: Strictly Commercial Purpose and Opinions on Newsworthy Topics

Falwell sued unsuccessfully for appropriation of his name and likeness in the *Hustler* parody ad.¹¹⁴ Falwell's group, the "Moral Majority," opposed pornography, among other things. *Hustler* used Falwell's image to express its opinion on a newsworthy topic.

108. *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360 (S.D.N.Y. 1988). See also an earlier case involving Phil Boroff, the same Woody Allen look-alike, *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985).

109. *Men's World Outlet*, 679 F. Supp. at 361.

110. *Id.* at 362, 367.

111. *Id.* at 370. Allen used the Lanham Act, 15 U.S.C. § 1125(a) (1982), which, at the time the case was decided, stated, "Any person who shall affix, apply, or annex, or use in connection with any goods or services . . . a false designation of origin, or any false description or representation . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation." 679 F. Supp. at 368 n.15.

112. For instance, N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney Supp. 1990) and CAL. CIV. CODE § 3344 (West Supp. 1990) require that monetary advantage be gained. Oregon requires either economic exploitation or use of a picture when the picture was "obtained or broadcast in a manner or for a purpose wrongful beyond the unconsented publication itself." *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 883 (9th Cir. 1988) (quoting *Anderson v. Fisher Brdcast. Co.*, 300 Or. 452, 469, 712 P.2d 803, 818 (1986)).

113. Most jurisdictions recognize a cause of action for invasion of privacy through use of a name or likeness for nonadvertising purposes. New York, however, requires that all appropriation cases be brought under New York statutory law, which requires trade advertising purposes. Annotation, *Invasion of Privacy by Use of Plaintiff's Name or Likeness for Nonadvertising Purposes*, 30 A.L.R.3d 209 (1970 & Supp. 1990) (citing *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952)); N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney Supp. 1990). See generally Annotation, *Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising*, 23 A.L.R.3d 865 (1969 & Supp. 1990).

114. See *supra* notes 20-38 and accompanying text.

Similarly, two women represented by Gerry Spence's law firm also tried the tactic of suing for "misappropriation of image" in addition to suing for libel, infliction of emotional distress, and invasion of privacy.¹¹⁵ Peggy Ault founded an Oregon organization to oppose an adult video store, and Dorchon Leidholdt, a New Yorker, founded Women Against Pornography. *Hustler* recognized both women as its "Asshole of the Month."¹¹⁶ Their faces were superimposed over the naked rear end of a bent-over man. Ault was described as a "frustrated," "tightassed housewife" and a "deluded busybody."¹¹⁷ Leidholdt was called a "pus bloated walking sphincter" who suffered from both "bizarre paranoia" and sexual repression and belonged to a "frustrated group of sexual fascists."¹¹⁸

The Ninth Circuit rejected Ault's claim that her image was misappropriated for a commercial purpose. The court wrote, "While *Hustler's* objectives may well have commercial undertones, the article, as an expression of constitutionally protected opinion on a matter of public interest, is 'newsworthy.'"¹¹⁹ The Ninth Circuit likewise denied Leidholdt's claim of misappropriation. The court ruled that she had failed to state such a claim under the laws of New York or California "because Leidholdt's image was not used exclusively for *Hustler's* commercial gain."¹²⁰ The purpose, as in *Ault*, was not simply commercial because *Hustler* was expressing its opinion on the pornography debate.¹²¹ The court declared that "[t]he fact that *Hustler Magazine* is operated for profit does not extend a commercial purpose to every article within it."¹²²

115. *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877 (9th Cir. 1988); *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890 (9th Cir. 1988).

116. *Leidholdt*, 860 F.2d at 892.

117. *Ault*, 860 F.2d at 879.

118. *Leidholdt*, 860 F.2d at 892, 894.

119. *Ault*, 860 F.2d at 883.

120. *Leidholdt*, 860 F.2d at 895.

121. *Id.*

122. *Id.*

In 1989, an attorney in Spence's office filed a suit against *Hustler* on behalf of a feminist who helped draft an antipornography ordinance for Indianapolis. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1190 (9th Cir. 1989). The ordinance was held unconstitutional. *Id.* (citing *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986)). *Dworkin* was mentioned in three *Hustler* features in February, March, and December 1984. For instance, in the February feature, a cartoon depicted two lesbians engaging in oral sex. The caption read, "You remind me so much of Andrea Dworkin, Edna. It's a dog-eat-dog world." *Dworkin*, 867 F.2d at 1190-91. *Dworkin* admitted she was a public figure for purposes of this case. *Id.* at 1190. The court, citing *Ault* and *Leidholdt*, concluded the features were "privileged opinion." *Id.* at 1193.

Gerry Spence also sued Larry Flynt and *Hustler* magazine for libel, intentional infliction of emotional distress, and invasion of privacy, among other things. *Spence v. Flynt*, 647 F. Supp. 1266, 1268 (D. Wyo. 1986). In its July 1985 issue, *Hustler* ran an article that commented about Spence serving as *Dworkin's* attorney. *Id.* at 1269. But the federal district court

As a general conclusion, if an article expresses an *opinion on a newsworthy topic*, whether in a serious or satirical vein, this fact will override any incidental commercial purposes.¹²³ Courts protect fictional works, including parodies, which include the names of famous people.¹²⁴ The

found it had no jurisdiction in the case and remanded it to state court. *Id.* at 1274. No state case is available, according to the LEXIS computerized legal research service.

123. Newsworthiness caused Ann-Margret to lose her suit for violation of her right of privacy and right of publicity against *High Society Magazine*, which published a "Celebrity Skin" edition that included a picture of her nude from the waist up. The picture was taken from one of her movies. *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 404 (S.D.N.Y. 1980). The court said,

[T]he fact that the plaintiff, a woman who has occupied the fantasies of many moviegoers over the years, chose to perform unclad in one of her films is a matter of great interest to many people. And while such an event may not appear overly important, the scope of what constitutes a newsworthy event has been afforded a broad definition and held to include even matters of "entertainment and amusement, concerning interesting phases of human activity in general."

Id. at 405 (citations omitted).

Comedian Pat Paulsen also lost his suit for a preliminary injunction against Personality Posters, Inc., which marketed a poster with his photograph and the caption, "FOR PRESIDENT." *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 445, 299 N.Y.S.2d 501, 503 (N.Y. Sup. Ct. 1968). The court did not resolve the question of whether Paulsen had submitted the photograph to the defendant for unlimited distribution. *Id.* at 445-46, 299 N.Y.S.2d at 504. The court said,

It is apparently plaintiff's position that since "he is only kidding" and his presidential activities are really only a "publicity stunt" they fall outside the scope of constitutionally protected matters of public interest. Such premise [sic] is wholly untenable. When a well-known entertainer enters the presidential ring, tongue in cheek or otherwise, it is clearly newsworthy and of public interest. A poster which portrays plaintiff in that role, and reflects the spirit in which he approaches said role, is a form of public interest presentation to which protection must be extended.

Id. at 449-50, 299 N.Y.S.2d at 507.

In *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727 (S.D.N.Y. 1978), the court recognized the protection of newsworthiness, but said flatly, "there is no such informational or newsworthy dimension to defendants' unauthorized use of Ali's likeness." Instead, the picture of Ali naked on the cover of the magazine was merely used for the trade purpose of attracting attention. For more on the *Ali* case, see *supra* notes 104-107 and accompanying text. See generally Annotation, *Invasion of Privacy by Use of Plaintiff's Name or Likeness for Nonadvertising Purposes*, 30 A.L.R.3d 203 (1970 & Supp. 1990).

124. A family member brought a misappropriation suit as heir of movie legend Rudolph Valentino, whose real name was Rudolpho Guglielmi, after the American Broadcasting Corp. (ABC) aired the film, *Legend of Valentino: A Romantic Fiction*. *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 862, 603 P.2d 454, 455, 160 Cal. Rptr. 352, 352 (1979) (Bird, C.J., concurring). In *Guglielmi*, the California Supreme Court held that the common-law right of publicity is not inheritable. *Id.* at 861, 603 P.2d at 455, 160 Cal. Rptr. at 353. In a concurring opinion, Chief Justice Bird stated,

[N]o author should be forced into creating mythological worlds or characters wholly divorced from reality. The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction.

exclusively commercial use of a person's name or likeness, however, constitutes forbidden appropriation.

Having characterized the satirical statements about Ault and Leidholdt as opinion, the Ninth Circuit concluded that whether women were public figures or private persons made no difference.¹²⁵

IV

Commercial and Personal Interests

A. Is the Law on Satirical Expression of Opinions Fair?

For persons who have actively joined the fray, the doctrine that satirical expression of an opinion on a newsworthy topic overrides incidental commercial purposes appears to be a prudent protection of first amendment rights. Any weakening of first amendment protection in this area could well jeopardize many expressions of opinion, including editorials and political cartoons.¹²⁶ Victorious *Hustler* publisher Larry Flynt, in the July 1988 issue of *Hustler*, wrote an ecstatic editorial entitled, "Fuck You If You Can't Take a Joke."¹²⁷ Speaking of his fight against erosion of the first amendment and "Falwell's attempt to intimidate and stifle political and social satire,"¹²⁸ Flynt said:

Letting Falwell get away with his claim could have wiped out any form of satire, from political cartoons to standup comics' routines that lampoon obvious targets of our time.

....

Id. at 869, 603 P.2d at 460, 160 Cal. Rptr. at 358 (Bird, C.J., concurring). The court then gave the example of cartoonist Gary Trudeau and his *Doonesbury* strip, which satirizes famous people. *Id.* at n.12. Although few courts have considered the question, consistently "the right of publicity has not been held to outweigh the value of free expression." *Id.* at 872, 603 P.2d 461-62, 160 Cal. Rptr. 359-60. In 1984, however, the California legislature made the right of publicity inheritable. CAL. CIV. CODE § 990 (West Supp. 1990).

In *Rogers v. Grimaldi*, 695 F. Supp. 112 (S.D.N.Y. 1988), *aff'd*, 875 F.2d 994 (2d Cir. 1989), Ginger Rogers sued MGM/UA over its release of the film *Ginger and Fred*, created and produced by Federico Fellini. Rogers lost on her claim that the movie violated the Lanham Act, § 43(a), 15 U.S.C. § 1125(a) (1982), by causing the mistaken impression that the film was about her or that she in any way endorsed it. Nor did the film violate her common-law right of publicity or constitute false-light invasion of privacy. 875 F.2d at 997-1005. The film is about two fictional dancers who imitated Rogers and Astaire in their cabaret act. *Id.* at 996-97.

125. The Ninth Circuit concluded in the *Ault* case that "the opinion privilege bars recovery for intentional infliction of emotional distress whether Ault is a public figure or a private person for first amendment purposes and we do not decide her status." *Ault*, 860 F.2d at 880.

In an earlier case, the same court had concluded that the opinion privilege applies to private as well as public persons in defamation cases. *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (1983).

126. See *supra* notes 32-35 and accompanying text.

127. Flynt, *Publisher's Statement: Fuck You If You Can't Take a Joke*, *HUSTLER*, July 1988.

128. *Id.*

... I am very happy to have helped ensure that one of those [legal] precedents guarantees every American the right to make fun, particularly of those people who try to hold themselves above the rest of the world.¹²⁹

One judge involved in the *Falwell* case concurred with Flynt: "Nothing is more thoroughly democratic than to have the high-and-mighty lampooned and spoofed."¹³⁰ Certainly caricatures of Ronald Reagan's wrinkled neck or Dan Quayle's boyish, sometimes vacant grin should not result in successful appropriation of image claims. Whoopi Goldberg should be permitted to act out Reagan's "screwing" segments of the American population in her literal, licentious fashion without fear of legal reprisal.

If the only goals are to protect commentary on newsworthy issues and not further subject publishers to the difficult task of trying to determine when a person has crossed the line from private individual to public person, the *Pring* decision seems sound. But protection of reputation is also an important goal. As the Supreme Court has repeatedly said, the right of every individual to protect his or her reputation "'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'"¹³¹ Worth, in terms of personal value, is given little consideration in *Pring*.

Worth, in terms of commercial value, however, is given consideration by the courts. Traditionally, courts have given less protection to commercial speech than to political speech.¹³² But, courts have given even less protection to people than to commercial speech. In its infancy, the FTC could only protect commercial interests, not people, from deceptive advertising. The United States Supreme Court pointed out this absurdity in a 1931 case, *Federal Trade Commission v. Raladam*.¹³³ The

129. *Id.*

130. *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting from *en banc* denial of rehearing).

131. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 311 (1974) (Stevens, J., concurring) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)). See quoted passage *infra* 175.

132. In *Valentine v. Christensen*, 316 U.S. 52 (1942), the Supreme Court unanimously denied first amendment protection to purely commercial advertising. But in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Supreme Court extended commercial protection to purely commercial advertisement. For cases on regulation of commercial speech, see, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), and *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986).

133. 283 U.S. 643 (1931). Section 5 of the Federal Trade Commission Act, ch. 311, 38 Stat. 717, 719-21 (1914) (codified as amended at 15 U.S.C. § 45 (1988)), stated that "unfair methods of competition in commerce are hereby declared unlawful." The Act supplements the Sherman Antitrust Act and the Clayton Act. *Federal Trade Comm'n v. Raladam*, 283 U.S. 644, 647 (1931) (citation omitted).

Raladam Company made "Marmola," a so-called "obesity cure" that contained "desiccated thyroid." Although Raladam claimed its concoction was "safe and effective," the FTC disagreed and ordered the company to stop its deceptive advertising.¹³⁴ But the Supreme Court said that the Act which established the FTC did not forbid deceptive advertising unless it also injured competing businesses.¹³⁵ In short, it was all right to hurt consumers, but not a competitor's business interests.

Over the next few years, consumers died unnecessarily from a variety of products, including nearly 100 people who died in 1937 from taking an untested drug known as "elixir sulfanilamide."¹³⁶ In 1938, Congress established the Food and Drug Administration to regulate false labeling of foods, drugs, and cosmetics¹³⁷ and gave the FTC power to protect consumers from false advertising.¹³⁸

In its protection of the right to satire or parody, the court system seems to be taking a position similar to that in the 1931 *Raladam* case—protecting commercial interests from harm, but not people. This analogy applies, for, just as in *Raladam*, where *commercial* interests were given more protection than *personal* interests (health and life), currently, *commercial* interests in names and likenesses are given more protection than *personal interests* (reputation and peace of mind). In short, courts are much more likely to grant a plaintiff recovery in satire cases concerned with commercial exploitation of the name or likeness of the individual than in satire cases involving the plaintiff's reputation or mental suffering.

Allowing no recovery for Pring, the target of a salacious joke, does not square well with allowing Johnny Carson to recover for "Here's Johnny—The World's Foremost Comedian."¹³⁹ The puckish use of Carson's identity by a portable toilet manufacturer pales beside the vulgar use of Pring's identity in *Hustler*. Nor does Pring's case fit well with "opinion" cases such as *Falwell*, *Letter Carriers*, or *Leidholdt*. The *Falwell* parody is truly unbelievable;¹⁴⁰ no one would literally consider

134. *Id.* at 645-46.

135. *Id.* at 649.

136. *United States v. Bacto-Unidisk*, 394 U.S. 784, 798 n.17 (1968); *United States v. Kaybel, Inc.*, 430 F.2d 1346, 1347 (3d Cir. 1970).

137. Federal Food, Drug and Cosmetic Act of 1988, §§ 201-706, 52 Stat. 1040 (codified at 21 U.S.C. §§ 301-393) (1988).

138. "Unfair methods or competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." Federal Trade Commission Act, 15 U.S.C. § 45 (1988).

139. See *supra* note 101 and accompanying text.

140. See *supra* note 21 and accompanying text.

nonstriking letter carriers to be "traitors";¹⁴¹ Leidholdt is not literally a "pus bloated walking sphincter."¹⁴²

But the statements made about Pring had such a sufficient ring of truth that her whole life was interrupted. While it would be impossible for Pring to cause levitation, certainly it would be possible for her to be an expert at fellatio.¹⁴³ Phrases such as "walking on Cloud Nine" or "walking on thin air" are familiar hyperboles; levitating is similar. While Pring's "act" would not be televised, certainly she could be indiscriminate about the time and place of her performance and liberal in acceding to requests. Her sexual mores could be "any time, any place, any one," as the *Penthouse* story suggested.¹⁴⁴ In short, the *Pring* story looks as if it presents facts that have just been stretched in an attempt to achieve a humorous effect¹⁴⁵—facts that Pring has great expertise in fellatio and will perform fellatio indiscriminately.

B. "False Facts": An Oxymoron and a Hazard

Unlike opinions, "false facts" receive no constitutional protection. According to the Court in *Gertz v. Robert Welch, Inc.*:

Under the [f]irst [a]mendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of

141. See *supra* note 87 and accompanying text.

142. See *supra* note 118 and accompanying text.

143. Dissenting in *Pring*, Judge Breitenstein said:

The article contains both fact and fiction. The article says that Miss Wyoming performed fellatio with a male companion and caused him to levitate. In her appearance at a national Miss America contest she thought that she might save the world by similar conduct with high officials. She manipulated her baton so as to simulate fellatio. She performed fellatio with her coach in view of television cameras. I consider levitation, dreams, and public performance as fiction. Fellatio is not.

Pring v. Penthouse Int'l, 695 F.2d 438, 443 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983) (Breitenstein, J., dissenting).

144. Historically, saying that a woman was promiscuous was one of four categories for slander *per se*, meaning that damages to reputation were presumed. See, e.g., *Hollman v. Brady*, 233 F.2d 877 (9th Cir. 1956); RESTATEMENT (SECOND) OF TORTS § 574 (1977). Presumed damages were ruled unconstitutional "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

145. A related problem is this: What if a statement of opinion implies that undisclosed defamatory facts are the basis of an opinion? Such statements can be held defamatory. See RESTATEMENT (SECOND) OF TORTS § 566 (1977); *Braig v. Field Communications*, 310 Pa. Super. 569, 581, 456 A.2d 1366, 1373 (1983), *cert. denied*, 466 U.S. 970 (1984) (adopting RESTATEMENT (SECOND) OF TORTS § 566). But fulfilling the *Restatement* requirements may be difficult. See *Cole v. Westinghouse Brdcast. Co.*, 386 Mass. 303, 313, 435 N.E.2d 1021, 1027 (1982) (denying recovery because it was not clear any undisclosed defamatory facts were implied). For an analysis of the *Restatement* concerning opinion, see Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1239-45 (1976).

other ideas. But there is no constitutional value in false statements of fact.¹⁴⁶

Some lower courts interpreted this passage to mean that while "false facts" are not protected, there is constitutional protection for all opinions.¹⁴⁷ But in 1990, in *Milkovich v. Lorain Journal Co.*,¹⁴⁸ the Supreme Court said, "[W]e do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'"¹⁴⁹ The Court used the example, "In my opinion Jones is a liar."¹⁵⁰ These words, the Court said, can damage a reputation as much as the words, "Jones is a liar."¹⁵¹ It is the "defamatory facts implied by a statement" that give rise to a defamation action.¹⁵²

146. 418 U.S. at 339.

147. For instance, the Court of Appeals for the District of Columbia said that "*Gertz* was . . . the first decision by the Court to suggest an absolute, constitutionally based protection for opinions." *Ollman v. Evans*, 750 F.2d 970, 975 n.7 (D.C. Cir. 1984). Opinions are protected regardless of whether they are expressed about private or public persons. "In a word, *Gertz*'s reasoning immunizes an opinion, not because the opinion is asserted about a public figure, but because there is no such thing as a 'false' opinion." *Id.* at 976.

148. 110 S. Ct. 2695 (1990).

149. *Id.* at 2705. Instead, the Court explained, the word "opinion" should be equated with the preceding word "idea," thus making the passage "merely a reiteration of Justice Holmes' classic 'marketplace of ideas' concept." *Id.*

150. *Id.*

151. *Id.* at 2705-06. The Court cites Judge Friendly's opinion in *Cianci v. New York Times Publishing Co.*, 639 F.2d 54, 64 (2d Cir. 1980): "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *Id.* at 2706. For more on the *Cianci* case, see *infra* note 176 and accompanying text.

152. *Milkovich*, 110 S. Ct. at 2706 n.7 (emphasis added). In *Milkovich*, the implied, defamatory facts appeared in a column written by Theodore Diadiun and published in an Ohio newspaper. The column implied that Michael Milkovich lied on the stand in a judicial proceeding. *Id.* at 2697-98.

Milkovich had been a high school wrestling coach in Maple Heights, Ohio, when a fight broke out between his team and a visiting team, injuring several people. At a hearing by the Ohio High School Athletic Association (OHSAA), both Milkovich and his school's superintendent, Don Scott, testified. OHSAA placed the Maple Heights team on probation and censured Milkovich for his conduct during the fight. Milkovich and Scott testified again in a suit against OHSAA filed by several parents and wrestlers who sought a restraining order on the grounds they were denied due process. OHSAA lost. *Id.* at 2698.

Diadiun's column bore the headline, "Maple Beat the Law with the 'Big Lie.'" The column said, in part,

"[A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"

"It is simply this: If you get in a jam, lie your way out.

"

"The teachers responsible were mainly Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott.

The Court's apparent question in *Gertz* and *Milkovich* is what constitutes a factual statement. The Court in *Milkovich*, however, declined the opportunity to present a list of factors for determining whether a statement presents a fact or an opinion. In fact, the Court said, "[W]e think the 'breathing space' which 'freedoms of expression require in order to survive,' . . . is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact."¹⁵³

In reviewing the case law that comprises this protective constitutional doctrine, the Court cited as first and foremost *Philadelphia Newspapers, Inc. v. Hepps*.¹⁵⁴ Under *Hepps*, at least in cases involving media defendants, statements about matters of public concern must be "provable as false" to result in defamation liability.¹⁵⁵ Next, the Court noted the protection established in the *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, *Letter Carriers v. Austin*, and *Hustler Magazine, Inc. v. Falwell* line of cases: statements which cannot "reasonably [be] interpreted as stating actual facts" cannot defame an individual. This standard protects "imaginative expression" and "rhetorical hyperbole."¹⁵⁶ The Court also listed as protection the "culpability" requirements of *New York Times* and *Gertz*.¹⁵⁷ Finally, the Court pointed to the

"....

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."

Id. (quoting *Milkovich v. The News-Herald*, 46 Ohio App. 3d 20, 21, 545 N.E.2d 1320, 1321-22 (1989)).

Milkovich sued for defamation, claiming the column accused him of committing perjury. *Id.* at 2699. After a tortuous history, *Milkovich* lost on the grounds that the article was "constitutionally protected opinion." *Id.* at 2698, 2700-01. See *infra* note 164 for the Ohio Supreme Court's reasoning based on the same factual situation.

The United States Supreme Court reversed and remanded the *Milkovich* case, concluding:

This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.

110 S. Ct. at 2707. See also *id.* at 2708-15 (Brennan and Marshall, JJ., dissenting).

153. *Id.* at 2706 (citation omitted).

154. 475 U.S. 767 (1986).

155. *Milkovich*, 110 S. Ct. at 2706.

156. *Id.* For a discussion of *Greenbelt Cooperative Publishing Association* and *National Association of Letter Carriers*, see *supra* notes 85-88 and accompanying text. For a discussion of *Falwell*, see *supra* notes 20-28 and accompanying text.

157. *Milkovich*, 110 S. Ct. at 2706-07. On *New York Times* and *Gertz*, see *supra* notes 39-48 and accompanying text.

"enhanced appellate review" of *Bose Corp. v. Consumers Union*.¹⁵⁸ The Court concluded, "We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the [f]irst [a]mendment."¹⁵⁹

Although the Court did not formulate a list of factors for determining if a statement is an opinion or fact, the Court did employ the distinction between opinion and fact. In *Milkovich*, it stated that the "connotation that the petitioner perjured himself is sufficiently factual to be susceptible of being proved true or false."¹⁶⁰ In short, the Court employed the opinion-fact distinction which it calls "artificial," and thus the distinction remains viable.

Because the Supreme Court provided little guidance in *Gertz*, lower courts formulated lists of factors for determining whether a statement presents a fact or an opinion.¹⁶¹ The Ninth Circuit applies a three-part test for determining if speech constitutes protected opinion:

(1) whether the words can be understood in a defamatory sense in light of the facts surrounding the publication, including the medium by which and the audience to which the statement is disseminated; (2) whether the context in which the statements were made, e.g., public debate or a labor dispute, would lead the audience to anticipate persuasive speech such as "epithets, fiery rhetoric or hyperbole"; and (3) whether the language used is the kind generated in a "spirited legal dispute."¹⁶²

158. *Milkovich*, 110 S. Ct. at 2707 (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984)). *Bose* requires "that in cases raising [f]irst [a]mendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Milkovich*, 110 S. Ct. at 2705 (quoting *Bose*, 466 U.S. at 499, which quoted *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)).

The *Milkovich* case presents an interesting, succinct history of defamation law. *Id.* at 2702-05, in which it quotes Shakespeare as follows:

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash;
'Tis something, nothing;
'Twas mine, 'this his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.

Id. at 2702 (quoting W. SHAKESPEARE, *OTHELLO*, Act III, scene 3).

159. *Id.* at 2707.

160. *Id.*

161. *Ollman v. Evans*, 750 F.2d 970, 975 (D.C. Cir. 1984). For an in-depth discussion, see Gleason, *The Fact/Opinion Distinction in Libel*, 10 HASTINGS COMM/ENT L.J. 763 (1988).

162. *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890, 893-94 (9th Cir. 1988) (quoting *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783-84 (9th Cir. 1980)). The

The "crux," according to the Ninth Circuit, "is whether a reasonable listener or reader should know the speaker did not intend to be taken literally."¹⁶³

In *Ollman*, the District of Columbia Circuit Court of Appeals presented an alternative to the Ninth Circuit test.¹⁶⁴ Its four-part test considers (1) the definiteness of a statement; (2) the verifiability of a statement; (3) its linguistic context; and (4) its social context.¹⁶⁵ Looking at the "common usage" of the language, the court first determines if it has a "precise core of meaning" (fact) or whether it is "indefinite and ambiguous" (opinion).¹⁶⁶ Second, the court considers whether a statement can be "objectively characterized as true or false" (fact).¹⁶⁷ This should aid the court in deciding if a statement deserves the "absolute privilege conferred upon expressions of opinion."¹⁶⁸ Moving from language to context, the court next considers the entire article from which the statement came¹⁶⁹ and, finally, the "broader context or setting in which the statement appears."¹⁷⁰ In considering this broader context, the court cited the finding in *Pring* that "the imputation that the plaintiff

court quotes the same test in *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 881 (9th Cir. 1988).

163. *Leidholdt*, 860 F.2d at 894.

164. *Ollman*, 750 F.2d at 979-85.

165. *Id.* at 985. In the case that arose out of the same factual situation as *Milkovich*, namely *Scott v. News-Herald*, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 706 (1986), the Ohio Supreme Court used the four *Ollman* factors to find that the language in Diadun's column was opinion. The Ohio Supreme Court decided that while the first two factors ("specific language" and "whether the statement is verifiable") leaned toward "fact," *id.* at 251-52, 496 N.E.2d at 707, they were outweighed by the third and fourth factors. *Id.* at 254, 496 N.E.2d at 709. Under the third, the "general context," the Ohio Supreme Court said "the large caption 'TD Says' . . . would indicate to even the most gullible reader that the article was, in fact, opinion." *Id.* at 252, 496 N.E.2d at 707. Under the fourth, the "broader context," the Ohio Supreme Court called the sports page, where the column appeared, "a traditional haven for cajoling, invective, and hyperbole." *Id.* at 253, 496 N.E.2d at 708. Thus, the Ohio Supreme Court concluded, the column "would probably be construed as the writer's opinion." *Id.* at 254, 496 N.E.2d at 708. For a brief discussion of the factual situation that gave rise to the *Milkovich* and *Scott* cases, see *supra* note 151.

The Ohio Supreme Court found the language in question to be assertions of fact in an appeal by *Milkovich*. Then the court heard the appeal in the *Scott* case and reversed itself, finding the language to be opinion. Then in a subsequent appeal in the *Milkovich* case, which bounced up and down from trial courts to appellate courts three times, the Ohio Court of Appeals considered itself bound to follow the Ohio Supreme Court's ruling in *Scott* that the language was opinion. *Milkovich*, 110 S. Ct. at 2698, 2700-01.

166. *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984).

167. *Id.*

168. *Id.* at 979, 982.

169. *Id.* at 979. Using the linguistic context, the United States Supreme Court was able to determine that the use of the term "blackmail" to describe a land developer's negotiations with the city was merely an expression of opinion. *Id.* at 982 (citing *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970)). See *supra* note 88 and accompanying text.

170. *Id.*

had committed sexual acts on stage at the Miss America Pageant could not support a libel action when the writing in which the statement appeared was clearly a 'fantasy.'"¹⁷¹

C. The Requirement of Literal Truth: An Invitation to Stretch Facts?

If a statement cannot be literally true, regardless of the test a court applies, should that alone be enough to give it constitutional protection? It is here that the court's opinion in the *Pring* case runs into difficulty. The Tenth Circuit found in *Pring* that the "story could not be taken literally."¹⁷² But the court then made a leap by adding, "it is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else."¹⁷³ In fact, readers who asked *Pring* such questions as "Are you really that good?" obviously did not consider the story "pure fantasy and nothing else." Instead, some readers apparently wondered if the story was merely a stretching of the truth—an addition of hyperbole to fact.¹⁷⁴

A *reductio ad absurdum* on *Pring*—carrying the case's logic to its extreme—shows the weakness of the decision. Under *Pring*'s logic, to avoid damages for libel, a publisher or broadcaster would merely have to stretch false statements of fact until the facts obviously could not be literally true. All the innuendo of a salacious story would be protected speech.

Sometimes even public figures or public officials may need protection. Does the publisher or broadcaster think an official is accepting bribes? There is no need to check out the facts. Just slant the story so that the amount cannot be literally true. Is the principal of the school perhaps having affairs with high school girls? No need to check out the facts before committing character assassination—just make the numbers or the situation too preposterous to be literally true. If the official is no

171. *Id.* at 984. The court also cited *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 286 (1974), saying, "The Supreme Court has expressly recognized the importance of social context when, in finding as an expression of opinion the use of the word 'traitor' as applied to an employee who crossed a picket line, the court stated that 'such exaggerated rhetoric was commonplace in labor disputes.'" *Ollman*, 750 F.2d at 983. See *supra* notes 83-84, 87 and accompanying text.

172. *Pring v. Penthouse Int'l*, 695 F.2d 438, 439 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

173. *Id.* at 443. Compare *Greenbelt Coop.*, 398 U.S. 6 (1970), where the Supreme Court said, "It is simply impossible to believe that a reader who reached the word 'blackmail' . . . would not have understood exactly what was meant . . ." Anyone would know that the real estate broker's tactics were legal and not "blackmail" in the sense of being a crime. The term "blackmail," the Court said, was "rhetorical hyperbole, a vigorous epithet." *Id.* at 14. The newspaper simply meant that the real estate developer's "negotiation position was extremely unreasonable." *Id.* at 14.

174. See *supra* note 91 and accompanying text.

longer electable or the principal can no longer maintain his position of trust in the community, that is just a price which must be paid for first amendment protection for political cartoons, opinions, and the like. The absurdity of this conclusion illustrates the flaw in *Pring*.

Certainly some protection for individuals is needed. Courts need to protect people, not just commercial interests, from misuse of their names or images, from libel with a salacious smile. Humor is often funny because it caricatures the truth, stretching it into absurd and funny shapes. But what if the parody creates the illusion that its humor is based on truth—truth merely stretched out of proportion? Then recovery for libel may be necessary in order to meet defamation's purpose of protecting an individual's interest in maintaining his or her reputation.¹⁷⁵

The Court of Appeals for the District of Columbia, which penned the four-part test for distinguishing fact from opinion, recognized that "[a] classic example of a statement with a well-defined meaning is an accusation of a crime. . . . Post-*Gertz* courts have therefore not hesitated to hold that accusations of criminal conduct are statements 'laden with factual content' that may support an action for defamation."¹⁷⁶ As an example, the court pointed to *Cianci v. New Times Publishing Co.*, which held that an article did not constitute protected opinion when it implied that the Mayor of Providence, Rhode Island, raped a woman and then paid her so she would not bring charges. The Second Circuit in *Cianci* stated,

The charges of rape and obstruction of justice were not employed in a "loose, figurative sense" or as "rhetorical hyperbole." A jury could find that the effect of the article was not simply to convey the idea that

175. According to *Gertz v. Robert Welch, Inc.*,

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."

418 U.S. 323, 341 (Stewart, J., concurring) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)).

Some protection already exists for defendants under *Gertz* in that, at least in cases where actual malice is not proved, actual damages cannot be presumed. Actual damages must be proved. Under common law, damages for libel were presumed. But the Supreme Court says, "the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." *Id.* at 349. Having to prove actual damages would prevent recovery for minor infractions by jokesters.

176. *Ollman v. Evans*, 750 F.2d 970, 980 (D.C. Cir. 1984) (quoting *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 63 (2d Cir. 1980)). See generally Annotation, *Imputation of Criminal, Abnormal, or Otherwise Offensive Sexual Attitude or Behavior as Defamation—Post-New York Times Cases*, 57 A.L.R.4TH 404 (1987 & Supp. 1989).

The RESTATEMENT (SECOND) OF TORTS § 566 (1977) states that liability for defamatory opinion only exists if the opinion implies that it is based on "undisclosed defamatory facts." See *supra* note 144.

Cianci was a bad man unworthy of the confidence of the voters of Providence but rather to produce a specific image of depraved conduct committing rape with the aid of trickery, drugs and threats of death or serious injury, and the scuttling of a well-founded criminal charge by buying off the victim. . . . To call such charges merely an expression of "opinion" would be to indulge in Humpty-Dumpty's use of language.¹⁷⁷

The act of fellatio has been condemned by criminal statutes outlawing sodomy. While modernizing criminal codes has led to the abolition of sodomy statutes in some states, the taint remains, especially when combined with promiscuity.¹⁷⁸ As with Humpty-Dumpty, "all the king's horses and all the king's men" couldn't put Pring's reputation together again after the imputations in *Penthouse*.

The Supreme Court has recognized that "it is . . . often true that one man's vulgarity is another's lyric."¹⁷⁹ But if the vulgarity casts serious doubts on another's morality, the lyric should be ruled out of sync with first amendment protection.

V

Conclusion

Debate must be "uninhibited, robust, and wide-open."¹⁸⁰ Politicians must have thick skins; so must anyone who jumps to the forefront in any newsworthy fray. Our rambunctious, disputatious society will not tolerate molly coddling. Nor should society stifle creativity in the arts or tell political cartoonists to put away their caustic pens and produce pablum. On the other hand, society need not tolerate *laissez faire* mud slinging.

Courts rightfully do not want a chilling effect on the press or freelance writers. Courts must maintain "breathing space" for first amendment freedoms.¹⁸¹ However, courts should be wary of a chilling effect on lifestyles in general. Running for governor or mayor or school board member, entering a beauty pageant with or without scholarships, playing

177. *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 64 (2d Cir. 1980). But if the writer had made the charges so outrageous that they could not be literally true, perhaps the *Cianci* case would have been decided in the plaintiff's favor.

See also *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 381-82, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951 (1977) (statement that a judge was "probably corrupt" did not use words in a merely "loose, figurative sense").

178. Historically, accusations of "serious sexual misconduct," especially by women, have been held defamatory. See, e.g., RESTATEMENT (SECOND) OF TORTS § 574 comments b, c (1977).

179. *Cohen v. California*, 403 U.S. 15, 25 (1971) (Harlan, J., writing for the Court).

180. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

181. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988); *New York Times Co.*, 376 U.S. at 271-72, 279.

football, twirling a baton—some of these activities are more frivolous than others, but they are still an essential part of freedom. Especially needed is “breathing space” for private persons: in the headier heights of public life, “breathing space” is necessarily a little tighter.

The doctrine that if satire cannot be literally true, it cannot be actionable, goes too far. Writers merely have to stretch any seemingly factual content beyond the bounds of literal credibility, leaving behind the taint—and the nagging questions in people’s minds: “Hey, Penthouse, are you really that good?”¹⁸²

182. Spence, *supra* note 4, at 52.